

AMENDED IN ASSEMBLY MARCH 11, 1999

AMENDED IN ASSEMBLY MARCH 1, 1999

CALIFORNIA LEGISLATURE—1999–2000 REGULAR SESSION

ASSEMBLY BILL

No. 209

Introduced by Assembly Member Cedillo

January 25, 1999

An act to amend Sections 4635, 4636, 4637, ~~and 4638~~ 4638, ~~and 4639~~ of the Labor Code, relating to workers' compensation.

LEGISLATIVE COUNSEL'S DIGEST

AB 209, as amended, Cedillo. Workers' compensation: vocational rehabilitation.

Existing law governing workers' compensation prescribes procedures and standards for determining the medical eligibility of an injured employee to accept and participate in vocational rehabilitation services. Existing law, among other things, provides that when aggregate total disability exceeds 365 days and the employee has not been previously identified as medically eligible for vocational rehabilitation, there shall be a rebuttable presumption that the employee is medically eligible for vocational rehabilitation services.

This bill would, in addition, provide that if the employer or insurer fails to comply with specified requirements regarding the determination of medical eligibility for vocational rehabilitation, any offer of modified or alternative work made

after 365 days of aggregate disability shall not be binding upon the employee.

This bill would additionally provide that when aggregate total disability exceeds 90 days, *and if the employer has failed to comply with the same specified requirements regarding the determination of medical eligibility for vocational rehabilitation*, the employer or the employer's insurer shall assign within 10 days a qualified rehabilitation representative to develop a job description, to submit the description for medical review, to explore the ability of the employee to engage in temporary modified work, if available, and to explore the availability of modified or alternative work, if the employee is excluded from engaging in his or her usual occupation or the occupation in which he or she was engaged at the time of injury. It would also authorize the representative in that case to refer the employee for a medical evaluation of the employee's functional or physical capacity to perform modified or alternative work.

This bill would also require qualified rehabilitation representatives, in addition to their existing qualifications, to be members in good standing of, or certified by, a related professional organization that has a peer review mechanism. This bill would also make ~~several technical, conforming~~ related changes.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 4635 of the Labor Code is
2 amended to read:
3 4635. As used in this article:
4 (a) "Qualified injured worker" means an employee
5 who meets both of the following requirements:
6 (1) The employee's expected permanent disability as
7 a result of the injury, whether or not combined with the
8 effects of a prior injury or disability, if any, permanently
9 precludes, or is likely to preclude, the employee from
10 engaging in his or her usual occupation or the position in

1 which he or she was engaged at the time of injury,
2 hereafter referred to as “medical eligibility.”

3 (2) The employee can reasonably be expected to
4 return to suitable gainful employment through the
5 provision of vocational rehabilitation services, hereafter
6 referred to as “vocational feasibility.”

7 (b) “Qualified rehabilitation representative” means a
8 person capable of developing and implementing a
9 vocational rehabilitation plan and whose experience and
10 regular duties involve the evaluation, counseling, or
11 placement of disabled persons, who is familiar with this
12 article, and who is a member in good standing of, or
13 certified by, a related professional organization that has
14 a peer review mechanism. It is the intent of the
15 Legislature to allow use of an in-house qualified
16 rehabilitation representative. If the injured worker is
17 represented by an attorney, and an in-house qualified
18 rehabilitation representative is utilized, communication
19 directly with that in-house qualified rehabilitation
20 representative by the injured worker’s attorney shall not
21 constitute a violation of Rule 2-100 of the State Bar Rules
22 of Professional Conduct.

23 (c) “Independent vocational evaluator” means a
24 qualified rehabilitation representative, who, in addition
25 to meeting all of the requirements of subdivision (b), has
26 one of the following qualifications:

27 (1) A doctorate or master’s degree in vocational
28 counseling or its equivalent and one or more years
29 full-time experience in vocational counseling of
30 industrially injured employees.

31 (2) A doctor of medicine degree and one or more years
32 full-time experience in psychiatric or psychological
33 evaluation of disabled adults in relation to rehabilitation
34 counseling.

35 (3) A doctorate or master’s degree in counseling or
36 psychology or their equivalent and two or more years
37 full-time employment using rehabilitation counseling
38 techniques and conducting vocational evaluations of
39 disabled adults under the direct supervision of an
40 independent vocational evaluator.

1 (4) A baccalaureate degree in any field and three or
2 more years full-time employment using rehabilitation
3 counseling techniques and conducting vocational
4 evaluations of disabled adults under the direct
5 supervision of an independent vocational evaluator.

6 (d) “Vocational rehabilitation services” means those
7 services required to determine if an employee can
8 reasonably be expected to return to suitable gainful
9 employment and those services reasonably necessary to
10 provide an employee with the opportunity to return to
11 suitable gainful employment. These services may
12 include, but are not limited to, vocational and medical
13 evaluation, counseling, job analysis, job modification
14 assistance, retraining, including on-the-job training or
15 training for alternative employment, formal training,
16 academic instruction, and job placement assistance.

17 (e) “Vocational rehabilitation plan” means the
18 written description of and rationale for the manner and
19 means by which it is proposed that a qualified injured
20 worker may be returned to suitable gainful employment.
21 The plan may contemplate direct job placement
22 assistance, on-the-job training, formal training, academic
23 instruction, job placement assistance, or
24 self-employment. The plan shall specify the anticipated
25 completion date of vocational rehabilitation services and
26 the amount and source of payments to be made to the
27 qualified injured workers during the pendency of the
28 plan. The plan shall also define the responsibilities of the
29 employee, employer, qualified rehabilitation
30 representative, and any other parties in implementing
31 the plan. The plan may contemplate modification of the
32 employee’s occupation at the time of injury or provision
33 for alternative work if the employer has initially failed or
34 refused to provide modified or alternative work to the
35 injured worker.

36 (f) “Suitable gainful employment” means that
37 employment or self-employment which is reasonably
38 attainable and which offers an opportunity to restore the
39 employee as soon as practicable and as near as possible to
40 maximum self-support, due consideration being given to

1 the employee's qualifications, likely permanent
2 disability, vocational interests and aptitudes, preinjury
3 earnings and future earning capacity, and the present
4 and projected labor market. No one factor shall be
5 considered solely in determining suitable gainful
6 employment.

7 SEC. 2. Section 4636 of the Labor Code is amended to
8 read:

9 4636. (a) When aggregate total disability continues
10 for 90 days, the employer immediately shall provide to
11 the employee in the form and manner prescribed by the
12 administrative director, information that provides notice
13 of rights under the Americans with Disabilities Act and
14 the provisions of the Fair Employment and Housing Act
15 relating to individuals with a disability, and that explains
16 the employee's rights and obligations pertaining to
17 vocational rehabilitation, the nature and scope of
18 vocational rehabilitation services to which the employee
19 may be entitled, the maintenance allowance payable
20 under Section 139.5, the effect of any delay in the treating
21 physician's determination of medical eligibility, and that
22 additional information may be obtained from an
23 information assistance officer. When aggregate total
24 disability exceeds 90 days and the employee has not
25 previously been identified as meeting the medical
26 eligibility requirements of paragraph (1) of subdivision
27 (a) of Section 4635, the employer shall provide the
28 employee's treating physician with a job description,
29 developed jointly with the employee and the employer,
30 and the physical requirements of the employee's duties
31 at the time of injury in the form and manner prescribed
32 by the administrative director, and request the treating
33 physician to determine the employee's medical eligibility
34 for vocational rehabilitation services. The treating
35 physician's determination of medical eligibility shall take
36 into account the employee's current and probable future
37 medical condition, an estimate of the employee's current
38 and potential functional limitations, the ability of the
39 employee to accept and participate in vocational
40 rehabilitation services if and when indicated,

1 recommendations for subsequent evaluation or services,
2 if any, the ability of the employee to engage in light work
3 in a modified or alternative capacity, if available, and
4 other information as may reasonably be prescribed by
5 rules and regulations of the administrative director.

6 (b) If the employee's treating physician is unable to
7 make the assessment of medical eligibility at the time of
8 initial contact, the employer shall continue to monitor the
9 employee's recovery and request the treating physician
10 to report as soon as the physician is able to determine
11 whether the employee is medically eligible for vocational
12 rehabilitation services. The treating physician shall
13 report to both the employer and the employee no less
14 frequently than every 60 days thereafter. The report also
15 shall include an opinion concerning the physical
16 capabilities of the employee at the time of each report.
17 The reports shall continue to be made until the physician
18 provides a report concluding one of the following:

19 (1) The employee is released to return to work at his
20 or her usual occupation or, if the employee was engaged
21 in another occupation at the time of injury, the
22 occupation the employee was engaged in at the time of
23 injury.

24 (2) The employee's permanent disability as the result
25 of the injury, whether or not combined with the effects
26 of a prior injury or disability, if any, permanently
27 precludes, or is likely to preclude, the employee from
28 engaging in the employee's usual occupation or the
29 occupation in which the employee was engaged at the
30 time of injury.

31 (c) When aggregate total disability exceeds 90 days,
32 *and if the employer has failed to comply with the*
33 *requirements of subdivision (a) or (b),* the employer or
34 the employer's insurer shall assign within 10 days a
35 qualified rehabilitation representative to develop a job
36 description, to submit the description for medical review,
37 to explore the ability of the employee to engage in
38 temporary modified work, if available, and to explore the
39 availability of modified or alternative work, if the
40 employee is excluded from engaging in his or her usual

1 occupation or the occupation in which he or she was
2 engaged at the time of the injury. The qualified
3 rehabilitation representative may refer the employee for
4 a medical evaluation of the employee's functional or
5 physical capacity to perform modified or alternative
6 work.

7 (d) When aggregate total disability exceeds 365 days
8 and the employee has not been previously identified as
9 medically eligible for vocational rehabilitation, there
10 shall be a rebuttable presumption that the employee is
11 medically eligible for vocational rehabilitation services. If
12 the employer or insurer fails to comply with the
13 requirements of subdivision (a) or (b), any offer of
14 modified or alternative work made after 365 days of
15 aggregate disability shall not be binding upon the
16 employee.

17 (e) Immediately upon receipt of the treating
18 physician's final report required by this section, the
19 employer shall provide a copy to the employee together
20 with notice of the procedure to be followed in contesting
21 the treating physician's determination. The notice shall
22 be in writing in the form and manner prescribed by the
23 administrative director, and shall include the following:

24 (1) Notice of whether the employer will be able or
25 unable to offer modified or alternative work.

26 (2) Notice that the employee may be eligible for
27 services if the employee is unable to return either to his
28 or her usual occupation or the occupation in which he or
29 she was engaged at the time of injury.

30 SEC. 3. Section 4637 of the Labor Code is amended to
31 read:

32 4637. (a) Within 10 days after the employee is
33 medically eligible under subdivision (d) of Section 4636,
34 or the employer receives a physician's report, or
35 knowledge of a physician's opinion, indicating an
36 employee is medically eligible, the employer shall notify
37 the employee of his or her medical eligibility for
38 vocational rehabilitation services. The notice shall be in
39 writing, in the form and manner prescribed by the
40 administrative director, with a copy forwarded to the

1 vocational rehabilitation unit. The notice shall include all
2 of the following:

3 (1) An explanation of vocational rehabilitation
4 services available to the employee, including the
5 maintenance allowance payable under Section 139.5 and
6 the effect of any delay in the acceptance of vocational
7 rehabilitation services.

8 (2) Instructions as to how the employee may apply for
9 vocational rehabilitation services.

10 (3) Notice that failure to apply within 90 days of
11 receipt of notice of medical eligibility may terminate the
12 employee's entitlement to vocational rehabilitation
13 services, unless the treating physician determines that
14 the employee is medically unable to participate in the
15 provision of vocational rehabilitation services except as
16 otherwise provided by Section 5410.

17 (4) Notice of the employee's right to an agreed upon
18 qualified rehabilitation representative and to request an
19 evaluation of vocational feasibility prior to any
20 acceptance or rejection of vocational rehabilitation
21 services and the right to request a change of qualified
22 rehabilitation representative pursuant to Section 4640.

23 (5) Notice that vocational rehabilitation services may
24 not be settled or otherwise converted to cash payments.

25 Immediately thereafter, unless the employee's medical
26 condition precludes participation or the employee
27 declines to accept vocational rehabilitation services, the
28 employer shall assign a qualified rehabilitation
29 representative, selected in agreement with the
30 employee, to determine if the employee meets the
31 vocational feasibility requirements of paragraph (2) of
32 subdivision (a) of Section 4635. If agreement cannot be
33 reached, a qualified rehabilitation representative shall be
34 selected pursuant to Section 4640.

35 (b) If an employee is notified of his or her potential
36 entitlement to vocational rehabilitation services pursuant
37 to subdivision (a) and it is subsequently determined that
38 the employee is not a qualified injured worker, the
39 employer shall notify the employee, in the form and
40 manner prescribed by the administrative director, that

1 he or she is not entitled to further vocational
2 rehabilitation services, the reasons therefor, and the
3 procedure to be followed in contesting the
4 determination.

5 SEC. 4. Section 4638 of the Labor Code is amended to
6 read:

7 4638. (a) If the employee is determined to be a
8 qualified injured worker, and the employer notifies the
9 injured worker, pursuant to paragraph (1) of subdivision
10 (e) of Section 4636 that the employer will be unable to
11 provide modified or alternative work to that injured
12 worker, the qualified rehabilitation representative and
13 the employee, jointly, shall develop an agreed-upon
14 vocational rehabilitation plan pursuant to subdivision (e)
15 of Section 4635.

16 Vocational rehabilitation plans which utilize an
17 employee's transferable skills and experience shall be
18 preferable to plans that propose training for an
19 occupation in which the employee has no skills or
20 experience.

21 An insured employer in whose employment the injury
22 occurred shall receive a refund, payable in the same
23 manner as a return of a standard insurance premium,
24 from the insurer that provided the security for the
25 payment of compensation on the date of injury when the
26 employer, pursuant to Section 4644, returns the qualified
27 injured worker to modified or alternative work at the
28 employer's place of employment for 12 consecutive
29 months. The refund shall be equal to the standard
30 premium computed on the wages paid by the employer
31 to the qualified injured worker during the 12-month
32 period and shall be calculated as follows: multiply the
33 workers' compensation insurance premium rate times
34 the wages reported for workers' compensation insurance
35 for the qualified injured worker during that 12-month
36 period. For this calculation, the workers' compensation
37 insurance rate shall be the insurance premium rate or
38 rates per one hundred dollars (\$100) of payroll which
39 were applicable to the payroll reported for the qualified
40 injured worker during that 12-month period, modified by

1 the experience modification factor or factors, if any,
2 which were applicable to the employer during that
3 12-month period. During and after the 12-month period,
4 the qualified injured worker shall be protected against
5 discrimination pursuant to Section 132a.

6 (b) Within 90 days after determination of the
7 employee's vocational feasibility, the employer shall do
8 either of the following:

9 (1) Submit a vocational rehabilitation plan agreed to
10 by the employee to the administrative director's
11 vocational rehabilitation unit for review and approval
12 when required pursuant to Section 139.5.

13 (2) Request the administrative director's vocational
14 rehabilitation unit to resolve any dispute concerning the
15 provision of vocational rehabilitation services.

16 *SEC. 5. Section 4639 of the Labor Code is amended to*
17 *read:*

18 4639. (a) If the employer fails to assign a qualified
19 rehabilitation representative as required by Section 4636,
20 fails to notify the employee of possible entitlement to
21 these services pursuant to Section 4637, or fails to provide
22 timely vocational rehabilitation services, the employee
23 may request the administrative director to authorize the
24 provision of vocational rehabilitation services at the
25 expense of the employer. The administrative director
26 shall immediately advise the employer of the receipt of
27 the request.

28 (b) If the employer, within 20 days of receipt of the
29 administrative director's notification, fails either to agree
30 to provide vocational rehabilitation services, *including*
31 *the assignment of a qualified rehabilitation*
32 *representative pursuant to subdivision (c) of Section*
33 *4636*, or to demonstrate that the employee is not a
34 qualified injured worker, the administrative director
35 shall authorize the provision of vocational rehabilitation
36 services through a qualified rehabilitation representative
37 of the employee's choice or, at the employee's request,
38 through an independent vocational evaluator.